No. 82-1474

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN
ROBERT D. MYERS and HAROLD J. WOLFINGER
Petitioners,
vs.
EDWARD RONWIN,
Respondent,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF THE PETITIONERS

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SUMMARY OF ARGUMENT

None of the parties or amici support the holding of the Court of Appeals that California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) limits officials' immunity to conduct (1) pursuant to a specific, clearly articulated and affirmatively expressed state policy compelling the challenged conduct and (2) actively supervised by the State. Ronwin and the amici supporting him each propose a test for state officials stricter than the Midcal test for private persons.

Ronwin argues that only one state action test exists for both state officials and private persons. He argues that the Arizona Supreme Court

was required to give prior and explicit approval of "the detailed substance" of the challenged conduct. (Brief at 61).

The amici curiae States reject the Midcal test for state officials. While conceding that officials need not be actively supervised (Brief at 13-14, n. 10), they argue that the specific conduct must be either "clearly necessary to effect" state policy or "'clearly articulated and affirmatively expressed' in the ... state policy." (Id. at 11-13).

The United States also rejects the active supervision requirement, but argues that conduct is immune only if it is "in furtherance" of a clearly articulated state policy. (Brief at 8, 11). The United States believes that federal judges must examine the reasonableness and purpose of

regulatory conduct to decide if it is state action.

The Examiners believe that, as state officials, they are not subject to such stringent tests. The federalism principle underlying the state action doctrine prohibits unintended, needless interference with the States' traditional regulatory role. Even so, the Examiners' conduct is direct action by the State which satisfies the most demanding state action test. The dismissal of the complaint was also correct under Noerr-Pennington, res judicata and jurisdictional principles.

ARGUMENT

I. THE GRADING OF BAR EXAMINATIONS BY STATE OFFICIALS IS "STATE ACTION."

A. Grading examinations is immune as state regulatory activity.

The Examiners believe that governmental acts by state officials

are exempt from federal antitrust liability. Their immunity flows directly from Parker v. Brown, 317 U.S. 341 (1943). Parker holds that federal antitrust law does not proscribe state regulatory acts even though they are anticompetitive. The Examiners are exempt because their conduct, like the establishment of raisin quotas by the commission members in Parker, is direct action by the state itself. Since the complaint establishes the official nature of the challenged action, the complaint was properly dismissed. (See Complaint, ¶'s 2, 3, 5 at J.A. 7-9)

Ronwin alone contends that the Examiners are not state officials. Yet Ronwin's complaint identifies the Examiners as members of an Arizona Supreme Court committee exercising that Court's power to regulate bar

admissions. (J.A. 7-8, ¶2). This allegation establishes that the Examiners are state officials.[1/]

The Examiners' official status does not conclude the state action inquiry, but it does establish the starting point. "[N]othing in the ... Sherman Act ... suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." Parker, 317 U.S. at 350-351 (emphasis added).[2/] State officials are

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[1/] See Bates v. State Bar of Arizona, 433 U.S. 350, 361 (1977) (State Bar acted as agent of Arizona Supreme Court in enforcing court rules governing lawyers, and therefore claims against it are "claims against the state").

[2/] The fact that the challenged acts were performed by the Arizona Supreme Court's Committee on Examinations rather than the Court itself does not alter the analysis. The grading of bar examinations by the

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subject to less demanding requirements for antitrust immunity than are private persons, a distinction which has been recognized repeatedly by this court. Bates, 433 U.S. at 361; Community Communications Co. v. City of Boulder, Colo., 455 U.S. 40, 52 (1982); New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 110 (1978). Boulder confirms the difference between the Examiners' direct state action and the indirect implementation of state policy through municipal action:

(Continued from previous page) Committee is just as immune as the Commission's establishment of raisin quotas held to be action of the State "acting through the Commission" in Parker v. Brown, 317 U.S. at 352.

In fact, the Arizona Supreme Court actually decided Ronwin's application. The real but unnamed defendant in this action is the Arizona Supreme Court. See Bates, 433 U.S. at 361 (State is real defendant in claim against State Bar).

> Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, see Parker, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see City of Lafayette, Orrin W. Fox Co., and Midcal.

Boulder, 455 U.S. at 52 (emphasis added).[1/]

A different test for state action therefore applies to state officials.

[1/] As part of the State itself, the Committee on Examinations is entitled to the "federal deference" denied to cities. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412 (1978). The Examiners are not equivalent to political subdivisions of the state "with substantially less than statewide jurisdiction" pursuing their own purely "parochial interests." Id. at 413, 414, 416. Rather, the Supreme Court's Committee on Examinations is an integral part of that Court, exercising the Court's power, and pursuing important policies of statewide concern.

"[W]here there is no question that the challenged conduct is committed by the state itself," the tests for cities and private persons are not used because they are not needed to assure that the conduct is truly state action. Ajax Aluminum, Inc. v. Goodwill Industries, 564 F.Supp. 628, 632 (W.D. Mich. 1983). The Examiners are engaged in direct action by the State as an arm of the Arizona Supreme Court.

The federal courts do not need to examine the officials' conduct to see if it is sufficiently related to the State's policy. Ronwin alleged that the Examiners are state officials engaged in regulating bar admissions. Rule 28 shows that the Examiners regulated pursuant to authority delegated by the Arizona Supreme Court. Regulatory actions by state

officials in pursuit of state policy are immune. It is not necessary for the officials to prove that their conduct is "reasonable," necessary," or that the anticompetitive consequences of their actions are minimized, as Ronwin and the amici States and United States propose. If the officials have engaged in misconduct, then state mandamus relief and judicial review stand ready to correct their abuses. But federal antitrust law is not an appropriate means of keeping the conduct of state officials within the bounds of state law.

Arizona's bar examiners are entitled to the same deference as the California officials in Parker. Grading bar examinations is exempt from antitrust law as state action.

B. The grading of bar examinations is contemplated by Arizona's clearly articulated policy of restricting entry into the legal services market.

The Examiners believe that they also satisfy the state action test for cities set forth in Lafayette and Boulder because Arizona clearly articulated an affirmative policy to supplant competition with regulation and Arizona's regulatory policy contemplated administering bar examinations.

The principal dispute here is whether the Examiners must also show either that the policymaker approved the details of the regulatory action or that the scoring method was "reasonable," "necessary" or limited to the minimum needed to effect the state policy.

1. The State's policy need not be detailed.

The State policymaker need not express its regulatory policy or methods in detail to prove that regulatory acts are state action. This Court stated the correct test in Lafayette:

> This does not mean, however, that a political subdivision must be able to point to a specific detailed legislative authorization ... [A]n adequate state mandate ... exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."
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> 435 U.S. at 415 (quoting opinion of Court of Appeals in Lafayette).

Parker v. Brown supports this proposition. The specific raisin quotas set by the defendant commission members were not approved by the California Legislature. The

legislature had simply authorized the commission to establish a program pursuant to the general state policy "to 'conserve the agricultural wealth of the state' and to 'prevent economic waste in the marketing of agricultural crops' of the state." 317 U.S. at 346 (quoting statute).

Similarly, the particular scale for scoring the bar examinations did not have to be specified by the Arizona Supreme Court. It was enough for that Court to have directed that the Examiners devise and administer an examination.[4/]

[4/] The amici States assert that Boulder requires that the clearly articulated standard be "strictly applied." (Brief at 15). Boulder held only that neutral state statutes expressed no state regulatory policy. 455 U.S. at 55.

2. The Examiners' actions were contemplated by the Arizona Supreme Court as a means of executing the policy of regulating the legal services market.

The Examiners' conduct need only be of the type "contemplated" by the State's policymaker. This is the test applied in Boulder and Lafayette.

The Examiners' conduct satisfies this test. Administering and grading bar examinations is clearly contemplated within Arizona's policy of regulating legal services. Arizona has a comprehensive system of such regulation.[5/] The existence of

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[5/] The practice of law in Arizona is highly restricted both by statute and by judicial rules. Among the regulations are barriers to market entry: an applicant must pass an examination and demonstrate satisfactory character and fitness. Rule 28. Once admitted to practice, a lawyer's conduct is regulated in detail. E.g., A.R.S. §§ 32-263, 32-266, 32-267; 32-273; Rule 29, Rules of the Arizona Supreme Court.

such "a system of regulation, clearly articulated and affirmatively expressed, designed to replace unfettered business freedom" demonstrates the State's regulatory policy. Fox, 439 U.S. at 109.

Grading the bar examination results is certainly contemplated as a method of implementing the state's policy. In fact, the Arizona Supreme Court specifically directed the Examiners to devise and score an examination.[5/] The Examiners

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[5/]Ronwin contends that a different version of Rule 28 was in effect when he took the bar examination in February and March 1974. The Supreme Court of Arizona amended Rule 28 in January of 1974 to delete a reference to "a grade of seventy or more in the general examination" and substitute the following: "The Committee may utilize the Multistate Bar Examination ... and may utilize such grading or scoring system as the Committee deems appropriate in its discretion." The
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did just that. Unless the Arizona Supreme Court were to devise, grade and score the examinations itself, more explicit state authority for the Examiners' actions is inconceivable.

(continued from previous page) amendment was made effective on January 15, 1974. The amended rule and its effective date are found at 110 Ariz. XXVII, XXXII. Ronwin argues that the amendment was not in effect for the February 1974 examination because A.R.S. § 12-109 provides that "the rules shall not become effective until sixty days after distribution." (Brief at 11, emphasis supplied by Ronwin). This statute, however, applies only to rules of "pleading practice and procedure in judicial proceedings." A.R.S. § 12-109(A). Moreover, the Arizona Supreme Court has inherent and constitutional power to govern admissions, to promulgate court rules and to make rules effective immediately. Ariz. Podiatry Ass'n v. Director of Insurance, 101 Ariz. 544, 422 P.2d 108 (1966); Application of Levine, 97 Ariz. 88, 397 P.2d 205 (1964); In re Collins, 108 Ariz. 310, 497 P.2d 523 (1972). (continued on next page)

C. More stringent scrutiny of state action would undermine federalism.

Ronwin and his supporting amici propose that the state policy must expressly approve the details of the challenged conduct or that the specific conduct must be necessary, reasonable or "in furtherance" of state policy. (Ronwin's Brief at 60; States' Brief at 15, 20; Brief of United States at 11, 17, 28).

The argument that the scoring method may not limit admissions any

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Moreover, Ronwin's belief that former Rule 28 required a "preset" score of "70" (Brief at 28, 39) is not supported by the text of the rule. Ronwin also incorrectly states that the Examiners' answer admitted that there was a "pre-set" standard of "70." (Brief at 30; Complaint, ¶¶ 3, 6 at J.A. 9-10; Answer, ¶¶ 3, 5 at J.A. 17-18).

more than necessary to assure competence is a type of "less drastic means" test already rejected by this Court. In Bates, the claimants argued that "the advertising ban is not tailored so as to intrude upon the federal interest to the minimum extent necessary." 433 U.S. at 361. This Court correctly rejected that argument. Such a strict test for state action defeats the very purpose of the doctrine: to leave the States' pursuit of their own policy goals unfettered by the threat of federal antitrust liability.

Moreover, the United States does not define its proposed "in furtherance" test. If this is simply the "contemplated" test restated, then the Examiners meet it. If the test is one of "reasonableness," then the United States offers an unworkably

vague standard. If the test searches for state authorization of the challenged action, Rule 28 provided ample authority for the Examiners to administer and grade the examination.

The proposed new tests also rely on whether the Examiners acted for a "proper" purpose or an "anticompetitive purpose." (Ronwin's Brief at 31; Brief of United States at 7-8; States' Brief at 8, 16-18). This inquiry into the motive of state officials was emphatically rejected by this Court in Lafayette. 435 U.S. at 411, n. 41.[1/]

[1/]Moreover, if determinations of motive or purpose are needed to apply the state action exemption, then summary judgment would be entered only rarely in favor of the state officials. See Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962) (summary judgment should be granted only rarely in antitrust case where intent is at issue). The
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The problem with such inquiries into purpose, reasonableness and necessity is that they thus undermine federalism. We are told, for example, that federal courts should decide "the adequacy of the delegation [of authority by the State], and agency compliance with it." (Brief of United States at 14). These are matters of the States' own governmental operations, however, which must be left to them if they are to retain any sovereignty.

If regulatory acts can be attacked as "unreasonable" or "unnecessary,"

(continued from previous page) assertion of the United States that dismissal may be refused because summary judgment is easily obtained (Brief at 26) is thus inconsistent with its own argument that the defendants' purpose must be examined.

then every "routine governmental act will be subject to antitrust scrutiny." P. Areeda, "Antitrust Immunity for 'State Action' After Lafayette," 95 Harv. L. Rev. 435, 450 (1981). The conduct challenged in Parker v. Brown would not have survived such close scrutiny. The California legislature did not expressly approve the raisin quotas. Nor could it have proved that the quotas did not restrict competition any more than necessary to meet the State's goals. It can always be argued that the anticompetitive effects of the state regulation are too great. The whole point of the state action doctrine, however, is to exempt state action despite its anticompetitive effect.

Equally inimical to federalism are the proposals that the state

policymaker must expressly approve the specific actions being challenged. Such a rule would prevent any delegation of authority within state governments. How can state governments function if state legislatures and supreme courts are forbidden to delegate and must approve countless regulatory details?

Federal antitrust law does not undertake to restrain action by a state or its officials. Parker v. Brown, 317 U.S. at 350-352.[1/] This Court has noted that state regulation

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[1/] The authorities cited in support of strict new state action tests do not in fact support them. For example, the United States cites Boulder and Lafayette as requiring that the challenged conduct be "in furtherance" of a specific state policy. (Brief at 11, 17 and note 17). Actually, this Court applied the "contemplated" test in those cases. Lafayette, 435 U.S. at 415; Boulder, 455 U.S. at 55. The lower court cases cited by the United States also support the "contemplated" test of

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of the bar "is at the core of the State's power to protect the public," Bates, 433 U.S. at 361, and that "we intend no diminution of the authority of the state to regulate its professions." Goldfarb v. Virginia State Bar, 421 U.S. 773, 793 (1975). The proposed new tests would have just such an untoward effect.

D. The Examiners satisfy even the proposed new tests for state action immunity.

The Examiners' actions in scoring the examinations were specifically contemplated by the Arizona Supreme Court as part of its policy to employ a bar examination as a barrier to

(Continued from previous page) Lafayette. See cases cited in Brief of United States at 11; see also Campbell v. City of Phoenix, 1983-2 CCH Trade Cas. ¶ 65,753 (D. Ariz. Nov. 21, 1983) (rejecting a proposed "in furtherance" test); First American Title Co. v. S. Dakota Land Title Assn., 714 F.2d 1439 (8th Cir. 1983) (applying contemplated test to political subdivision.)

market entry in legal services. That Court's Rule 28 explicitly directs the Examiners to devise and grade an examination, and Ronwin's complaint does not contend that the Examiners did anything else.

The Examiners' conduct also was both "reasonable" and "necessary" to achieve state policy. Amici curiae argue that limiting the number of passing applicants is not necessary to assure lawyer competence. (States' Brief at 20; Brief of United States at 17). Even if the State's policy were solely competence, the argument fails because it rests on a misunderstanding of the grading process. Ronwin's complaint alleges that he was first given a raw score -- i.e., one which counted the number of correct answers -- and that his raw score was converted to a zero to 100 scale with

70 as the passing score. He claims that this method of scoring "artifically" restricted admission to the bar and thereby reduced the numbers of Arizona lawyers. (J.A. 10-11).

The grading system which Ronwin describes is called "scaled scoring."[9/] Raw scores alone are meaningless because they reflect only the number of correct answers.[10/] For example, a mathematician might have no correct

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[9/] Ronwin sometimes refers to a "raw-score system" but his complaint describes a scaled score: "A scaled score is the score on a test when the raw score obtained has been converted to a number on a standard reference scale." "Equating to Obtain Scaled Scores for the Multistate Bar Examination," in S. Duhl (ed.), The Bar Examiners' Handbook 65, n.1 (2d ed. 1980).

[10/] W. Angoff, "Scales, Norms and Equivalent Scores" in R. Thorndike (ed.), Educational Measurement 533 (2d ed. 1971).

answers if the examination questions were sufficiently difficult. The mathematician's zero raw score would not reflect zero competence in mathematics.

Raw scores therefore must be compared to some standard of ability. The standard is ordinarily based on the test performance of others. The standard is incorporated into a grading scale to facilitate the comparison.

Testing inherently results in limiting the number of "successful" examinees. The whole point of a test is to select those who perform relatively well. Ronwin correctly observes: "[T]he very act of choosing a raw score as equal to 70 is automatically and inseparably hinged to a determination of the number of admitted examinees." (Brief at 55-56).

The fact that the scoring scale determines how many examiners pass signifies nothing sinister, however; it is an inescapable result of standardized testing.

Ronwin's thesis is that the Examiners' scoring method failed more applicants than needed to assure competence. That theory makes every examination grade vulnerable to an antitrust attack, for the decision of how many applicants will pass is always vulnerable to second-guessing. No matter what the contents of the examination and the method of scoring, someone must draw the inevitably inexact line between a passing score and a failing score.[11/] Federal

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[11/] It is possible to use a raw score if the examiner uses supplementary interpretive data; this is merely a more cumbersome version of scaled scoring. There is only one way
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district judges are no better able to set the passing score and determine legal competence than a state supreme court and its bar examiners.

E. Although State officials need not be "actively supervised," the Examiners were actively supervised by the Arizona Supreme Court.

1. Midcal's active supervision requirement does not apply to state officials.

Since the Examiners meet the "clearly articulated" standard, the

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to use the "preset" raw score Ronwin suggests: the test is of such difficulty that a barely competent person receives exactly a passing score. S. Tinkelman, "Planning the Objective Test," in Thorndike, supra at 67. Even if such a test could be devised, the examiner must still choose the minimum level of test performance which he believes demonstrates "competence." That decision is no more precise or objective when implemented by adjusting test difficulty than by adjusting the scoring scale. An examination using Ronwin's "pre-set" score is therefore equally vulnerable to an antitrust challenge.

only remaining question is whether Midcal's "active supervision" requirement applies to state officials as well as to private persons. Antitrust claims against state officials pose "an entirely different case" than claims against private parties, however. Bates, 433 U.S. at 361. Neither state officials nor cities have been required to be actively supervised. Parker v. Brown, supra; Fox, supra; Lafayette, supra; Boulder, 455 U.S. at 51-52, n. 14 (reserving the question). The Court of Appeals conceded that the Examiners are state officials, and incorrectly required that they be actively supervised as if they were not officials.

Ronwin alone supports the use of the active supervision test in this case. Ronwin argues that "active

supervision" means that the state policymaker must approve the particular conduct in advance. (Brief at 61). By Ronwin's thinking, the Parker Court should have required that the California Legislature have "precleared" every raisin quota adopted by the commission.

The Examiners' arguments against an active supervision requirement stand unchallenged, however. (See Examiners' Brief at 46-54). Active supervision would eliminate necessary delegation of state authority to individual officials. Supervision by the usual methods of state legislative oversight, judicial review and mandamus ensure that state officials act within the bounds of their authority. Any contrary conclusion indicts the ability of the States to keep their own houses in order, and

thus indicts the viability of our federal system of government.

2. Even if active supervision is required, the Examiners were actively supervised by the Arizona Supreme Court.

Neither Ronwin nor the amici curiae who support him deny that the Examiners are actively supervised by the Arizona Supreme Court. (See Examiners' Brief at 70-73). That Court reviews individual examinations by petition of the applicant. Even if the Examiners are subjected to the more stringent test applicable to private persons, then, they are still entitled to antitrust immunity.

II. IN PETITIONING THE ARIZONA SUPREME COURT, THE EXAMINERS ARE IMMUNE UNDER THE "NOERR-PENNINGTON" DOCTRINE.

Ronwin and his supporting amici premise their antitrust challenge on the assumption that Petitioners were acting in a "private" capacity. This

assumption is unwarranted and contradicts Ronwin's own allegations that Petitioners acted as a Committee of the Arizona Supreme Court. Even if Petitioners were acting as private persons, however, they are immune under the Noerr-Pennington doctrine.

Petitioners recommended action by the Arizona Supreme Court on Ronwin's application. This conduct is immune as an attempt to influence governmental action.

Neither Ronwin nor any of his supporting amici dispute the above facts.[12] Instead, they argue

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[12] The United States contends in its Brief (at 30-31, n. 36) that the recommendation of the Examiners is "effectively final." This assertion is made without any authority; the United States elsewhere cites cases wherein the Arizona Supreme Court overruled Petitioners' recommendations. Id. at 19, n. 21.

that: (1) Noerr-Pennington immunity was not effectively raised before the Ninth Circuit; (2) the grading process, not the recommendation, is being challenged; (3) the Noerr doctrine protects only "political activity"; and (4) the recommendation may fall within the "sham exception" to the doctrine. (Ronwin's Brief at 64-68; United States' Brief at 30-31, n. 36.) None of these arguments defeats the Petitioners' immunity.

First, Noerr immunity is not being raised for the first time in this Court. The issue was raised in the Court of Appeals by amici curiae and in the Examiners' Petition for Certiorari.[11/]

[11/] It is also settled that an appellate court should affirm a lower court if the result below was right for the wrong reason. E.g., Helvering

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Second, it matters not that Ronwin claims to be attacking the grading and not the recommendation. The decisive fact is that the Arizona Supreme Court denied Ronwin's admission and caused his alleged injury. "Where a restraint upon trade ... is the result of valid governmental action ... no violation of the Act can be made out." Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961).

Third, the Noerr-Pennington doctrine is not limited to "political activity." See United Mine Workers of America v. Pennington, 381 U.S. 657

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v. Gowran, 302 U.S. 238, 245 (1937); Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971) (state action immunity decided on appeal though not raised below).

(1965) (executive action); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (judicial proceedings).[14/]

Finally, the United States argues that the Examiners' conduct may fall within the "sham" exception. (Brief at 30-31, n. 36). That exception is not applicable here, however, because Ronwin did not and could not plead sufficient facts to come within the exception (See Examiners' Brief at

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[14/] In addition, the United States argues that Noerr-Pennington should not apply to governmental agencies petitioning courts. (Brief at 30-31, n. 36.) The Examiners' Noerr-Pennington argument assumes, however, that the argument of the United States has succeeded in proving that the Examiners are private persons and not officials. If the Examiners are officials exercising state power, they do not need Noerr-Pennington immunity because the state action doctrine protects them.

82-84) and because Petitioners have not barred Ronwin from access to the courts. (Id. at 85-86.)[15]

III. RONWIN'S COMPLAINT WAS PROPERLY DISMISSED BECAUSE THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION AND BECAUSE THE COMPLAINT IS BARRED BY RES JUDICATA.

The district court's dismissal of Ronwin's complaint was also required under the principle set forth in District of Columbia Court of Appeals

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[15] Even if frivolous litigation were within the sham exception, it should be limited to repeated frivolous suits. Otter Tail Power Co. v. United States, 410 U.S. 366, 380 (1973). Ronwin, having repeatedly and unsuccessfully sought judicial relief, shows that the Examiners' position has not been frivolous. Examiners' Brief at 86-87. The history of Ronwin's litigation regarding the Arizona bar appears in In the Matter of Ronwin, ____ Ariz. ____, 667 P.2d 1281, cert. denied sub nom. Ronwin v. Supreme Court of Arizona, ____ U.S. ____, 104 S.Ct. 413 (1983).

v. Feldman, ____ U.S. ____, 103 S.Ct. 1303 (1983) and res judicata.

The jurisdictional defect noted by this Court in Feldman, supra, should be applied to antitrust cases challenging bar examinations.[16/] In that case, this Court held that district courts lacked jurisdiction

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[16/] Ronwin asserts that this issue may have been waived by not being included in the Examiners' Brief.

This Court can consider issues supporting a judgment even if it is not encompassed by the petition for certiorari, United States v. New York Tel. Co., 434 U.S. 159, 166, n. 8 (1977), and even if not raised below. Fox, 439 U.S. at 109. n. 13. Consideration of these issues presents no difficulty because there are no disputed facts relating to the prior judicial proceedings which bar Ronwin's complaint. Fox, supra. Moreover, Ronwin is not prejudiced because he has had a chance to brief these issues before this Court. Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263 (1960).

over constitutional challenges to denials of individual bar applications by the highest court of a state and that any further challenge had to be made to this Court. Ronwin made that challenge when he unsuccessfully petitioned for certiorari in Ronwin v. Committee on Examinations and Admissions of the Supreme Court of Arizona, 419 U.S. 967 (1974). The district court's dismissal of the complaint therefore should be sustained for lack of jurisdiction.

In order to avoid this jurisdictional problem, Ronwin argues that his complaint is not a challenge to an individual failing grade, but to a method of grading the entire examination. This ignores the very language of Feldman: such general challenges are barred when they are inherently "intertwined" with a

challenge of an individual failing grade. Feldman, 103 S.Ct. at 1317.

Ronwin's complaint is also barred by res judicata.[17] Res judicata precludes relitigation of issues that were or could have been raised in a previous proceeding concluded by a final judgment on the merits. Allen v. McCurry, 449 U.S. 90 (1980); Kremer v. Chemical Const. Corp., 456 U.S. 461 (1983). Res judicata requires a final decision on the merits, and an identity of causes of action and of parties or their privies. Nash County Board of Education v. Biltmore Co.,

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[17] This issue may be decided on appeal because the facts supporting invocation of res judicata are undisputed and a remand would be meaningless. Southard v. Southard, 305 F.2d 730 (2d Cir. 1962); see also Fox, 439 U.S. at 109, n. 13.

640 F.2d 484 (4th Cir.), cert. denied, 454 U.S. 878 (1981).

Ronwin raised his antitrust challenge to the grading system once before in his petition for review to the Arizona Supreme Court. In re Petition of Ronwin, SB-52, cert. denied, sub nom. Ronwin v. Committee on Examinations and Admissions of the Supreme Court of Arizona, 419 U.S. 967 (1974). The decision of the Arizona Supreme Court was final and on the merits. See Boynton v. Commonwealth of Virginia, 364 U.S. 454, 456-7 (1960) (summary disposition by state supreme court finally decided all issues presented below).

The only dispute is whether the cause of action is identical, given the federal courts' jurisdiction over federal antitrust claims. (Brief of United States at 29, n. 35). The

United States' position that the Arizona Supreme Court could not have considered a federal antitrust problem is erroneous. Both Feldman, 103 S.Ct. at 1313, n. 14 and Bates, 433 U.S. at 356-357, involved antitrust issues raised in state courts.[18/]

IV. RONWIN'S OTHER ISSUES SHOULD NOT BE CONSIDERED.

Ronwin's Brief also attempts to present a constitutional challenge to the 1974 examination, attacks the Court of Appeals dismissal of the

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[18/] In Hayes v. Solomon, 597 F.2d 958, 984 (5th Cir. 1979), cert. denied, 444 U.S. 1078 (1980) and Kurek v. Pleasure Driveway & Park District of Peoria, 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979), upon which the United States relies, the antitrust claims were either not raised or not considered in the state courts. See also England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 419 (1964) (federal claims presented to state court cannot be relitigated in federal court).

Examiners' spouses as defendants, and raises the issue of judicial immunity.

This Court declined to consider the first two issues which were presented in Ronwin's cross-petition for certiorari. Ronwin v. Hoover, et al., ____ U.S. ____, 103 S.Ct. 2110 (1983). There is no more reason to consider those issues now than when the Court declined the cross-petition.[12/]

[12/] In any event, the constitutional challenge would be barred by res judicata and by the district court's lack of jurisdiction. See discussion supra at 35-40. In addition, Ronwin's constitutional claim is based upon the same misunderstanding of scaled scoring as his antitrust claim. Testing and scaled scoring are constitutional because they are rationally related to a legitimate state interest in regulating the bar. See Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232, 239 (1957).

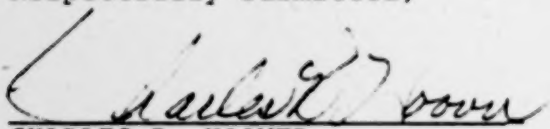
Ronwin finally argues that judicial immunity does not protect the Examiners. If this issue is considered, the Examiners submit that their conduct in applying the rule and making recommendations pursuant to Rule 28 are entitled to absolute judicial[20/] and prosecutorial immunity. Butz v. Economou, 438 U.S. 478 at 511-512 (1978).

[20/] The Examiners' application of Rule 28(c) was no less a "judicial" proceeding than the act of the judges in refusing to waive the admission rule in Feldman, supra.

V. CONCLUSION

For the reasons stated above, the order and opinion of the United States Court of Appeals for the Ninth Circuit should be reversed and the order and judgment dismissing respondent's complaint should be reinstated.

Respectfully submitted,



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